114-387

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. 258.

JOSE AURREOCEHEA, PLAINTIFF IN ERROR,

vs.

DUNCAN SINCLAIR, ED. R. HAMILTON, WM. P. COLEMAN, THE SACRAMENTO SAVINGS BANK, JOHN DOE, AND RICHARD ROE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 21, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. 258.

JOSE AURREOCEHEA, PLAINTIFF IN ERROR,

vs.

DUNCAN SINCLAIR, ED. R. HAMILTON, WM. P. COLEMAN, THE SACRAMENTO SAVINGS BANK, JOHN DOE, AND RICHARD ROE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	1
Transcript from District court	5	2
Complaint	5	2
Demurrer	16	8
Order sustaining demurrer	18	9
Judgment	18	9
Notice of appeal and service	19	9
Stipulation as to transcript	19	10
Opinion	21	10
Judgment	23	16
Bond	24	16
Clerk's certificate	26	17
Assignment of errors	27	18

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Jose Aurreocehea, plaintiff in error, and Duncan Sinclair, Ed. R. Hamilton, William P. Coleman, The Sacramento Savings Bank, John Doe, and Richard Roe, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth.

[SEAL.] L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Dist. of Cal.,
By J. F. O'BEIRNE,
Deputy Clerk.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

2 [Endorsed:] United States Supreme Court. Jose Aurreocehea, plaintiff in error, *vs.* Duncan Sinclair *et al.*, defendants in error. Writ of error. Filed July 10, '82. F. W. Gross, clerk, by C. Harlan, deputy clerk.

3 UNITED STATES OF AMERICA, *ss:*

To Duncan Sinclair, Ed. R. Hamilton, William P. Coleman, The Sacramento Savings Bank, John Doe, and Richard Roe, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Jose Aurreocehea is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Stephen J. Field, Associate Justice of United States Supreme Court, this seventh day of July, A. D. 1882.

[SEAL.] ——— ———

Service of the above citation is hereby admitted on behalf of the above named defendants in error on this the 8th day of July, 1882.

MICH MULLANY,
Attorney for Defendants in Error.

4 [Endorsed:] United States Supreme Court. Jose Aurreocehea, plaintiff in error, *vs.* Duncan Sinclair [*et al.*], defendants in error. Citation. Filed July 10, 1882. F. W. Gross, clerk, by C. Harlan, deputy clerk.

5 *Transcript on Appeal.*

In the Supreme Court of the State of California.
Third District Court, County of Alameda, State of California.

JOSE AURREOCEHEA, Plaintiff,
vs.
DUNCAN SINCLAIR, ED. R. HAMILTON, WILLIAM P. COLEMAN, THE SACRAMENTO SAVINGS BANK, JOHN DOE, and RICHARD ROE, Defendants.

Complaint.

The plaintiff, Jose Aurreocehea, for cause of action against the above-named defendants, avers and shows to said court the following facts, to wit:

I.

That the plaintiff is ignorant of the names of certain defendants herein, and has designated such defendants by the names of John Doe and Richard Roe.

That heretofore, to wit, in the year 1863, the State of California, by its proper officer, to wit, the State locating agent, and in pursuance and under and by virtue of the laws of said State, and in part satisfaction of the grant by the United States to said State of the 16th and 36th sections of land in each township in said State, or other lands in lieu thereof, under an act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853, selected and located the following-described land, viz.: The north half of the southeast quarter of section seven, 6 township three south, range three east, Mount Diablo meridian, in the county of Alameda, State of California, containing eighty acres of land, more or less.

That said land was so selected and located by the State of California in lieu of and as indemnity for certain 16th and 36th sections of land in said State, or portions thereof, which had become lost to said State under the terms and conditions of said act of Congress aforesaid.

II.

That thereafter and on the 17th day of February, 1864, the State of California, under and in pursuance of the laws of said State in that behalf made and provided, sold said tract of land so selected and located as aforesaid, and the plaintiff and his grantors became and were the purchasers of said land in good faith from the State of California, and then and there paid to said State the purchase price therefor, pursuant to the law of the State; and then and there the State of California, by its proper officer, to wit, the register of the State land office, issued and delivered to the grantors of the plaintiff, pursuant to the law of the State, a certificate of purchase of said land; that in or about the year 1865 the grantor of the plaintiff, under and by virtue of said purchase and said certificate of purchase, entered into and upon said tract of land, and thereafter held and enjoyed the actual possession thereof until he was ousted therefrom by the defendants, as hereinafter more fully shown.

III.

7 That prior to the year 1866 the State of California had in the manner aforesaid selected and located a large amount of land in said State, in part satisfaction of grants by the United States to said State, and had in pursuance of the laws of said State sold said lands to purchasers in good faith under said laws; that many of such selections and locations were believed to be irregular and invalid under the laws of the United States by reason of the defective legislation and action on the part of the State in the selection and disposal of said lands; and the selection and location of the land hereinbefore described and sold to the grantor of the plaintiff was one of such irregular selections and locations.

That for the purpose of furnishing relief to all such *bona fide* purchasers of lands from the State and for the purpose of furnishing them with the means and opportunity of perfecting their said purchases and acquiring the legal title to the land so as aforesaid purchased by them from the State of California and at the request of said State, through its Legislature, the Congress of the United States did on the 23rd day of July, 1866, pass an act entitled "An act to quiet land titles in California."

That the township embracing the tract of land hereinbefore designated and described was surveyed in the field by the surveyor-general of the United States for the State of California, and by him sectionized and subdivided in the year 1862; that thereafter and in the same year he constructed such survey and delineated the same into and upon a township plat and approved such survey and plat and caused a duplicate of such township plat so made and approved as aforesaid by him to be filed in the General Land Office of 8 the United States at Washington, and in the office of the said surveyor-general at San Francisco; and as the plaintiff is informed and verily believes the said surveyor-general at the same time, to wit, in the year 1862, also caused a duplicate of such township plat and survey to be filed in the local land office in the district embracing said land, to wit, at San Francisco; that such township plat was afterwards, and after said State selection and location had been made by some person, unknown to the plaintiff, withdrawn and removed from said local land office, but was afterwards and on or about the 26th day of June, 1871, returned to and filed in said local land office, where the same has since remained and is now on file.

IV.

That long prior to said last-named date the plaintiff and those under whom he claims said land had presented said State selection and location, and the claim and title to said land thereunder, to the register and officers of said local land office of the United States, and said officers had a full and particular notice thereof; and said selection and location was by said register noted and entered in writing upon the tract book of said local land office, and the same was also entered upon and noted, in writing, upon the tract books of the General Land Office of the United States at Washington; that such notice and presentation was made and noted and entered in said tract books as aforesaid some time in the year 1866.

9 That said register of the local land office and the Commissioner of the General Land Office of the United States had full knowledge of all the facts herein stated in relation to said location, and selection, and sale by the State, and of the purchase of said land by the grantor of the plaintiff from and after the date of such presentation, and notice, and entry as aforesaid, but neglected to take any action thereon on account of the delay in the final settlement of the survey of that certain Mexican grant called "Las Pocitas," as hereinafter more particularly mentioned.

V.

That on or about the 24th day of September, 1870, the defendant, Duncan Sinclair, with full knowledge of the claim and title of the plaintiff to said land, as herein stated, and while the plaintiff, or those under whom he claims, was in possession of said land as aforesaid, did enter into and upon said land, and did oust the plaintiff and those under whom he claims therefrom, claiming the right to pre-empt said land under the general pre-emption laws of the United States.

That on the 26th day of June 1871, said defendant Sinclair filed in the local land office of the United States a declaratory statement of his intention to pre-empt said land.

VI.

That some time prior to the year 1860 one Robert Livermore and
another had obtained the final confirmation, in their names, under
the laws of the United States, of that certain Mexican grant called
"Las Pocitas;" that in the final decree of confirmation the
10 land designated and described as belonging to said grant is
stated as follows:

"The land of which confirmation is hereby made is known as

Las Pocitas, and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

That as a matter of fact the area of land embraced by the abovenamed boundaries is from ten to twelve square leagues, and embraces the greater portion of the land in the place known as Livermore Valley, in said Alameda county, and said exterior boundaries embrace the land in controversy in this action.

That in the year 1869 the surveyor general of the United States for the State of California made an official survey of said grant, which purported to segregate all the land rightfully belonging to said grant, "Las Pocitas," which survey embraced about two square leagues of land; that such survey became the final survey of said grant by the approval of the same, by the Secretary of the Interior of the United States, on the 6th day of June, 1871, and a patent was issued by the United States embracing the land contained in said survey, which patent was received by the claimants under said grant in full satisfaction thereof, and such survey and patent does not embrace any portion of the land in controversy in this action.

11 VII.

That after the plat of survey of said township, embracing the land in controversy, had been returned to said local land office as aforesaid, on the 26th day of June, 1871, and within three months thereafter, the plaintiff and those under whom he claims being the purchasers of said land, and claiming the same under said State selection and location, again presented said claim, and fully proved up such purchase and claim, so far as the facts were concerned, to the satisfaction of the Commissioner of the General Land Office of the United States.

That at the same time the defendant Sinclair contested the claim of the plaintiff aforesaid before the officers of the Land Department of the United States, claiming the right to pre-empt said land, as before stated.

That upon such contest and investigation said Commissioner found, as matter of fact, that in the year 1863 the State of California selected and located said land under the laws of said State, and did thereafter sell and dispose of the same to the grantor of the plaintiff, as hereinbefore more fully stated; and that on the 17th day of February, 1864, the grantor of the plaintiff became the purchaser in good faith of said land from the State under her laws, paid the purchase price, and received a certificate of purchase therefor, as hereinbefore stated.

And said Commissioner found generally all the facts the same as they are stated in this complaint, and thereupon said plaintiff and those under whom he claims submitted said claim to said Com-

missioner, and asked that said land be certified over to the
12 State of California, pursuant to said act of Congress, entitled
"An act to quiet land titles in California."

That the only objection made to said claim on said contest and investigation, and the only objection which has ever existed thereto, was the fact that said land, so selected and located as aforesaid, was embraced by said exterior boundaries of the Mexican grant "Las Pocitas," and that it was part & parcel of said ten or twelve square leagues aforesaid.

That said contest and investigation was had long after said tract of land in question had been forever excluded from any claim under said Mexican grant, and at a time when the same was subject to disposition by the Commissioner aforesaid, as other public lands of the United States.

That upon such issue and question of law alone the Commissoner of the General Land Office of the United States and the Secretary of the Interior of the United States both held and decided, upon their construction of the said act of Congress of July 23rd, 1866, that said land and claim was excluded from the operation and effect, and from the remedial and confirmatory provisions and all the provisions of said act of Congress, and solely because of the fact, and for no other reason than the following, to wit:

Because said land had been embraced by the exterior boundaries of said Mexican grant, and held or claimed under said grant until the 6th day of June, 1871, and thereupon and for that reason and no other said Commissioner of the General Land Office of the United States refused to approve said claim, and refused to
13 certify said land over to the State of California, but rejected
said claim, and then & there awarded said land to the defendant Sinclair, in virtue of his pre-emption claim aforesaid, and made an order permitting said Sinclair to enter said land under said pre-emption claim.

That afterward, and in pursuance of said decision, said Sinclair was permitted to and did enter said land, and on or about the 15th day of August, 1876, in pursuance of said entry and decision, said Commissioner caused a patent of the United States to be issued and delivered to said defendant, Duncan Sinclair, for said land, which patent transferred the title of said land to said Sinclair.

VIII.

The plaintiff avers that the decision of the Commissioner and Secretary of the Interior aforesaid was and is contrary to law, and that in making such said decision officers were mistaken in the legal construction of said act of Congress, and that if said officers had decided said matter according to law, said selection and location and claim of the plaintiff would have been approved, and the land would have been certified over to the State of California, pursuant to said act of Congress of July 23, 1866, and the plaintiff would have been enabled to and would have acquired the legal title to said land under the laws of the United States and the State of California; that by reason of the acts of the defendant Sinclair as aforesaid, and the mistake of

said officers as aforesaid, the plaintiff has been forever pre-
14 vented & disabled from perfecting his title to said land
under the laws of the United States and the laws of the State of California, to his great wrong and injury.

That said plaintiff is now the owner & holder of said certificate of purchase of said land from the State of California, and the equitable owner of said land, as hereinbefore described & stated.

IX.

That the other defendants named in the title of this complaint have, or claim to have, some interest in or claim to said land, holding or claiming to hold the same under or through said defendant, Duncan Sinclair, as the plaintiff is informed and verily believes, but what the nature or character of such claim or interest is the plaintiff is not fully informed, and is therefore unable to state more fully than as aforesaid.

Wherefore the plaintiff prays that all of the defendants above named may be required to appear in this action and answer this complaint, and set forth fully the nature of their interest in or claim to said land.

That it may be adjudged and decreed by the court that the plaintiff is the equitable & rightful owner of said land, and that the legal title to the same, now held by the defendant, Duncan Sinclair, or either of the defendants herein, is so held in trust for the plaintiff.

That it be further adjudged and decreed by the court that the
defendants convey said legal title to said land to the plaintiff
15 herein, and that the legal title to said land may be conveyed
to the plaintiff by said defendants or by a commissioner duly appointed by this court, and that the plaintiff may have such further or other relief as may be meet and proper and agreeable to equity and good conscience, and may have and recover the costs of this action

H. F. CRANE AND
PRINGLE & HAYNE,
Attorneys for Plaintiff.

SIDNEY L. JOHNSON,
Of Counsel.

STATE OF CALIFORNIA, }
City & County of San Francisco, } *ss:*

José Aurreocehea, being duly sworn, deposes & says: That he is the plaintiff in this action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

JOSE AURREOCEHEA.

Subscribed and sworn to before me, this 25th day of March, 1878.

[L. S.]

E. V. SUTTER,
Notary Public.

(Endorsed:) "Filed April 10th, 1878."

16

Demurrer.

(Title of Court and Cause.)

Now come the defendants, and demur to the complaint herein, and for cause allege—

1st. That said complaint does not state facts sufficient to constitute a cause of action.

2d. That said complaint is ambiguous, unintelligible, and uncertain, in this, viz:

a. It does not designate or describe the 16th and 36th sections of land, or portions thereof, in lieu of which the land in controversy was selected or located by said State locating agent, or how the same became lost to said State.

b. It does not allege or designate wherein the selection or location by said State of said described land was irregular.

c. It does not state or show that the township plat embracing said described land had been returned to or was on file in the local United States land office at the time of the alleged selection and location of said land, and does not show by whom or by what authority it was returned to said land office on June 26, 1871, or when or by whom or by what authority such returned plat was made or gotten up.

d. It does not show whether plaintiff's alleged cause of action herein has arisen prior to or subsequent to June 26th, 1871.

17 3rd. Said complaint does not state facts sufficient to constitute a cause of action, in this:

a. It appears therefrom that the subject-matter and the alleged cause of action therein stated has been adjudicated and determined by the lawful and judicial authorities of the Land Department of the United States, viz., the Commissioner of the General Land Department and the Secretary of the Interior, plaintiff submitting thereto.

b. It appears therefrom that all cause of action, or alleged cause of action therein stated, is barred by the provisions of section 318 of the Code of Civil Proceedure of the State of California.

c. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of section 319 of the Code of Civil Proceedure of the State of California.

d. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of section 322 of the Code of Civil Proceedure of the State of California.

e. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of section 337 of the Code of Civil Proceedure of the State of California.

f. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Proceedure of the State of California.

18 All of which sections are commonly known as the statute of limitations.

g. It presents or alleges no equities or equitable rights whatever in plaintiff.

Wherefore said defendants pray to be hence dismissed with judgment for their costs.

MICH. MULLANY,
Attorney for Defendants.

(Endorsed:) Filed May 18th, 1878, and within due time.

Order Sustaining Demurrer.

(Title of Court and Cause.)

APRIL 28, 1879.

The defendants' demurrer to plaintiff's complaint having been heretofore argued by the respective counsel and duly submitted to the court for decision, the court now orders that said demurrer be sustained; and the plaintiff's attorneys having declined to amend the complaint, it is ordered that judgment be entered in favor of the defendants for their costs.

Duly entered in Minute Book of April 28, 1879.

Judgment.

(Title of Court and Cause.)

On the 6th day of September, 1879, judgment was duly entered and recorded in accordance with the above order in favor of the defendants and against the plaintiff, that plaintiff take nothing by his action, and that defendants have and recover from plaintiff their costs of suit. The order referred to herein is the order obtained by defendants' counsel for judgment for defendants in accordance with the order of court sustaining demurrer, &c., dated Aug. 25, 1879.

Notice of Appeal.

(Title of Court and Cause.)

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California from the judgment in the said action in favor of defendants and against the plaintiff, and from the whole thereof, which said judgment was entered and recorded on the 6th day of September, A. D. 1879.

H. F. CRANE AND
PRINGLE & HAYNE,
Attorneys for Plaintiff.

SIDNEY L. JOHNSON,
Of Counsel.

To the clerk of said court and Mich. Mullany, Esq., attorney for defendants.

(Endorsed:) Service of the within notice of appeal, and the receipt of a similar notice admitted on this 29th day of May, A. D. 1880. Mich. Mullany, attorney for defendants. Filed May 29, 1880.

16

Demurrer.

(Title of Court and Cause.)

Now come the defendants, and demur to the complaint herein, and for cause allege—

1st. That said complaint does not state facts sufficient to constitute a cause of action.

2d. That said complaint is ambiguous, unintelligible, and uncertain, in this, viz:

a. It does not designate or describe the 16th and 36th sections of land, or portions thereof, in lieu of which the land in controversy was selected or located by said State locating agent, or how the same became lost to said State.

b. It does not allege or designate wherein the selection or location by said State of said described land was irregular.

c. It does not state or show that the township plat embracing said described land had been returned to or was on file in the local United States land office at the time of the alleged selection and location of said land, and does not show by whom or by what authority it was returned to said land office on June 26, 1871, or when or by whom or by what authority such returned plat was made or gotten up.

d. It does not show whether plaintiff's alleged cause of action herein has arisen prior to or subsequent to June 26th, 1871.

17 3rd. Said complaint does not state facts sufficient to constitute a cause of action, in this:

a. It appears therefrom that the subject-matter and the alleged cause of action therein stated has been adjudicated and determined by the lawful and judicial authorities of the Land Department of the United States, viz., the Commissioner of the General Land Department and the Secretary of the Interior, plaintiff submitting thereto.

b. It appears therefrom that all cause of action, or alleged cause of action therein stated, is barred by the provisions of section 318 of the Code of Civil Procedure of the State of California.

c. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of section 319 of the Code of Civil Procedure of the State of California.

d. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of section 322 of the Code of Civil Procedure of the State of California.

e. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of section 337 of the Code of Civil Procedure of the State of California.

f. It appears therefrom that all alleged cause of action therein stated is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

18 All of which sections are commonly known as the statute of limitations.

g. It presents or alleges no equities or equitable rights whatever in plaintiff.

Wherefore said defendants pray to be hence dismissed with judgment for their costs.

MICH. MULLANY,
Attorney for Defendants.

(Endorsed:) Filed May 18th, 1878, and within due time.

Order Sustaining Demurrer.

(Title of Court and Cause.)

APRIL 28, 1879.

The defendants' demurrer to plaintiff's complaint having been heretofore argued by the respective counsel and duly submitted to the court for decision, the court now orders that said demurrer be sustained; and the plaintiff's attorneys having declined to amend the complaint, it is ordered that judgment be entered in favor of the defendants for their costs.

Duly entered in Minute Book of April 28, 1879.

Judgment.

(Title of Court and Cause.)

On the 6th day of September, 1879, judgment was duly entered
and recorded in accordance with the above order in favor of the
defendants and against the plaintiff, that plaintiff take
19 nothing by his action, and that defendants have and recover
from plaintiff their costs of suit. The order referred to herein
is the order obtained by defendants' counsel for judgment for de-
fendants in accordance with the order of court sustaining demurrer,
&c., dated Aug. 25, 1879.

Notice of Appeal.

(Title of Court and Cause.)

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California from the judgment in the said action in favor of defendants and against the plaintiff, and from the whole thereof, which said judgment was entered and recorded on the 6th day of September, A. D. 1879.

H. F. CRANE AND
PRINGLE & HAYNE,
Attorneys for Plaintiff.

SIDNEY L. JOHNSON,
Of Counsel.

To the clerk of said court and Mich. Mullany, Esq., attorney for defendants.

(Endorsed:) Service of the within notice of appeal, and the receipt of a similar notice admitted on this 29th day of May, A. D. 1880. Mich. Mullany, attorney for defendants. Filed May 29, 1880.

Stipulation.

(Title of Court and Cause.)

For all the purposes of this appeal it is hereby stipulated that the foregoing transcript is correct, and that the pleadings, order, and notice therein are true copies of the originals of record in the superior court of Alameda county, and that the statement therein as to the entry of judgment is true, and that said transcript shall constitute the record on the plaintiff's appeal from the judgment,
20 and that an undertaking on said appeal in due form was filed in due time.

MICH. MULLANY,
Attorney for Defendants.
H. F. CRANE, AND
PRINGLE & HAYNE.

SIDNEY L. JOHNSON,
Of Counsel.

(Endorsed:) "Transcript on appeal." "Filed June 19th, 1880. F. W. Gross, clerk, by C. Harlan, deputy clerk."

21 *Opinion and Decision of Supreme Court of California. Filed May 30, 1882.*

In Bank.

AURRECORCHEA *vs.* SINCLAIR. } No. 7251.

By the complaint in this case the plaintiff seeks to charge the defendant as trustee of the legal title to a tract of land in Alameda county, known and described as the north half of the southeast quarter of section seven, township three south, range three west, M. D. meridian. A demurrer to the complaint was sustained by the court below; the plaintiff declined to amend; and final judgment having been entered against him he appeals.

Originally, as it appears from the complaint, the land formed a part of several leagues of land embraced within the exterior boundaries of a Mexican grant named Las Pocitas; and it stood in that position until June 6, 1871, when it was excluded from the grant by the confirmation of the final survey of the ranch.

On July 1, 1871, the surveyor-general of the United States for the State of California, having surveyed in the field the township within which the land was located, and sectionized and subdivided it, and constructed his survey into and upon a township plat, a duplicate of which he filed in the local land office in the district of San Francisco, within which the land was located; and the defendant, who was then and had been in possession of the land, residing upon and claiming it as a pre-emptioner, presented and filed in the local land office his declaratory statement of his intention to pre-empt the land under the pre-emption laws of the United States. Thereafter, and within three months after the township plat had been filed, the plaintiff, who also claimed the land as a purchaser from the State of California, presented and filed in the same office a claim to have the land certified over to the State for his benefit, pursuant to an act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866.

Upon these hostile and opposing claims a contest arose before the officers of the Land Department of the United States, which was heard by the Commissioner of the General Land Office, and determined adversely to the plaintiff; and the decision, on appeal, was affirmed by the Secretary of the Interior. By the decision the claim of the plaintiff was rejected; and instead of certifying the land over to the State of California for his benefit, as under the act of July 23, 1866, the plaintiff claims the Commissioner and Secretary of the Interior were bound to do, they, in alleged violation of the provisions of that act, awarded the land to the defendant under the pre-emption laws of the United States, and made an order permitting him to enter it under his pre-emption claim, and, upon his entry and payment of the purchase price of the land, caused to be issued and delivered to him a patent therefor on the 15th of August, 1876.

The plaintiff alleges that this decision was contrary to law, because he proved, in the investigation of the contest, to the satisfaction of the Commissioner of the General Land Office, and the Commissioner found that in the year 1863 the State of California, by its locating agent, selected and located the land in dispute in part satisfaction of the grant by the United States to said State of the 16th and 36th sections of land in each township in said State under an act of Congress, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853; and also in lieu of, and as indemnity for, certain of said 16th and 36th sections of lands in the State, or portions thereof, which had become lost to the State, under the terms and conditions of the act of Congress; that the State, after it had so selected and located the land, sold and disposed of the same to the grantors of the plaintiff on the 17th of February, 1864, to whom, on payment of the purchase price "pursuant to the law of the State," the register of the State land office issued and delivered a certificate of purchase, under and by virtue of which the purchasers entered into possession of the land, and continued in possession until September 24, 1870, when the defendant intruded upon their possession, and from that date has continued in the undisturbed possession of the same. But the plaintiff and those under whom he claims, "some time in 1866," presented to the register and officers of the local land office of the United States the State selection and location and their claim of title thereunder; and the same was by the register noted and entered in writing upon the tract-book of the local land office, and upon the tract-books of the General Land Office of the United States, at Washington, whereby the officers of the Land Department had notice of the equitable rights of the plaintiff.

Upon these proofs and findings the plaintiff claims that the land should have been certified over to the State for his benefit, and that he is now entitled to the patent, which, upon the erroneous decision of the Commissioner and Secretary of the Interior, has come into the hands of the defendant.

There is no doubt that where a party has obtained from the United States a patent to a tract of public land, which, in equity and good conscience, and by the laws which Congress has passed on the subject, ought, upon a true construction of those laws, to go to another who establishes a prior right to it, that a court of equity will control the patent in favor of the prior equity and compel a conveyance of it to the owner of the equity (Johnson *vs.* Towsley, 13 Wall., 72; Silver *vs.* Ladd, 7 Id., 228; Garland *vs.* Wynn, 20 How., 6; Lindsey *vs.* Hawes, 2 Black., 554); but to entitle the claimant of a patent issued to another to equitable relief he must show such a right to the premises described in the patent as in equity and good conscience and according to the laws of Congress upon which he relies entitles him to the patent. Coming into a court of equity, asking for the interference of equity, he must not only show an equitable right to relief, but he must offer to do equity. He must show a reason valid in conscience as well as an equitable title enforceable in a court of chancery.

Now, it will be observed that the basis of the claim asserted by the plaintiff rests upon the act of Congress passed July 23, 1866. By that act Congress undertook to confirm to the State all selections of any portion of the public domain made by her in part satisfaction of any Congressional grant, and which she had disposed of to purchasers in good faith under her laws. Certain lands were excepted from such confirmation, among which were lands covered by a Mexican or Spanish grant at the time of the selection; but if such lands were afterwards excluded from the grant, and became part of the public domain of the United States, they were made subject to the selection and to confirmation when the United States surveys were extended over them. (Huff *vs.* Doyle, 3 Otto, 558.) To this last class of lands the land in dispute belonged. It was not surveyed by the United States until 1871, and the official plat of the survey was not filed in the proper land office until the 28th of June, 1871. On that day the land became and was part of the public domain of the United States, and, for the first time, it was open for settlement as other public lands of the United States, to the plaintiff claiming as a purchaser under the State laws under the act of Congress, or to the defendant, who was then in possession of it, claiming the right to pre-empt it under the pre-emption laws. (Rich *vs.* Maples, 33 Cal., 109; Mahoney *vs.* Van Winkle, Id., 448; Newhall *vs.* Sanger, 2 Otto, 762.) When it became public land the claims to it of both the plaintiff and defendant depended upon the respective Congressional enactments under which they were presented to the Land Office. Neither of the parties acquired any equitable right to the land by the mere assertion of his claim. It was necessary for each to establish his right by making the proof required by the law under which he asserted it, and by showing a compliance with its terms and conditions. Originating, as did the right of the defendant, in the possession which he had of the land at the date of the filing of the official plat, his settlement gave him the status of pre-emptioner under the pre-emption laws. At the same time the act of Congress of July 23, 1866, extended to a purchaser in good faith from the State, whose right originated in selection and location under the State laws, the same pre-emption rights. Both *bona fide* purchasers from the State and pre-emption claimants under the United States were placed by the act on the same footing as to the acquisition of title. The object of the act, as has been said by our predecessors in Mandel *vs.* Toland, (38 Cal., 30,) "was to legalize the possession of locators upon unsurveyed lands until they have opportunity to present their claims for determination by the officers of the United States, as provided by the act, and to enable them to maintain actions in the courts in relation to it." (Foscalina *vs.* Doyle, 47 Cal., 437.) As residence and cultivation precede entry by a pre-emptioner, under the pre-emption laws, so selection and location upon public lands are necessary to the claim of a *bona fide* purchaser from the State under the act. Cultivable lands belonging to the State are grantable only to actual settlers. (Johnson *vs.* Squires, 55 Cal., 103.) The plaintiff admits that the State's selection was void, and that by it alone he acquired no right. He has, therefore, no equitable right to the land, unless the alleged selection and location have been recognized and ratified by the provisions of the act of 1866, and he has shown such a compliance with its terms and conditions as entitled him to the benefit of the act.

That act undertook to confirm selections made by the State upon two classes of land: 1st, lands which had been surveyed by the authority of the United States; and 2d, lands which had not been so surveyed. Section 2 provides, as a condition precedent to confirmation of selections upon surveyed lands, for a notice of such selection to be given by the "proper State authorities" to the Register of the United States Land Office. The law made the selection when this notice was given; and, upon being given, it became the duty of the Register to investigate and determine the claim, and if found to be for land to which the State would be entitled by the grant under which the claim of selection is made, the proper officer of the United States Land Office was authorized to certify it over to the State, if the State had not already received the quantity of land that she was entitled to, under her grant, as provided by sections 1 and 2 of the act.

But if selections had been made upon unsurveyed lands, such selections, when surveyed and marked off and designated in the the field, gave, according to the provisions of section 3 of the act, to a purchaser in good faith under the laws of the State, the pre-emption rights of a settler on the unsurveyed lands; and upon the filing of the township plat in the proper local land office, the State claimant was allowed the same time as a pre-emptor to present and prove up his purchase and claim under the act.

Now the alleged selection must have been made on surveyed or unsurveyed land. If made on unsurveyed land, the complaint of the plaintiff fails to show that the "proper authorities of the State" had notified the register of the proper land office of the selection, and neither that officer, nor any other officer of the land office, was bound by the act to certify the land over to the State. The complaint is also uncertain as to whether the claim of the plaintiff is asserted upon a selection made on surveyed or unsurveyed land; for while the complaint contains averments which show that, at the date of the selection, the land had been surveyed in the field by the proper officer, and that a record of the survey and plat thereof was made and filed, but was afterwards withdrawn; it also shows that the land did not become part of the public domain until it was excluded from the Mexican grant, within the exterior limits of which it was at the time of the alleged survey, and it was not subject to selection under the act of Congress until the filing of the official plat.

Besides, whether the land was surveyed or unsurveyed, it was necessary for the complaint to show by proper averments that the plaintiff, in the assertion of his claim to the land, proved that he had purchased it in good faith from the State; that it had been selected and located under the laws of the State as part of the surveyed or unsurveyed lands of the United States, which were subject to be so selected; and that he had complied with the terms and conditions of the act of Congress which ratified the selection (The Secretary *vs.* McGarrahan, 9 Wall., 298); these constituted the elements of his asserted equitable right. But upon all of them the
22 complaint is uncertain and insufficient.

It is not alleged, nor does the plaintiff claim, that he purchased the land directly from the State, or that he ever located on it, or occupied or improved it, or paid or contracted to pay the State for it. On the contrary, it is alleged that the land was purchased from the State by his grantor or grantors, to whom, after making a payment, pursuant to the laws of the State which required a payment of twenty per cent. of the purchase, a certificate of purchase was issued under which they occupied the land until 1870, when they were dispossessed by the defendant, who has ever since continued in the unquestioned and undisturbed possession of the land; and, except so far as it may appear from the averments of the legal conclusions that they were *bona fide* purchasers under the law of the State, and that a certificate of purchase was issued to him, it does not appear from any allegations in the complaint that they had complied with the laws of the State so as to constitute them *bona fide* purchasers from the State. It might be that the authorities of the State had refused to notify the register of the land office of the selection of the land, as they were bound to do by the second section of the act of Congress, just because the alleged purchasers had not complied with the State laws, and *non constat* that the State would have conveyed to them the land if it had been selected. Averments of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under a statute. It is true that under the laws of the State the certificate of purchase was made evidence of the legal title; but, having been issued for land which was not public land and had not been surveyed by the United States, the certificate was void. (Young *vs.* Shinn, 48 Cal., 26.) Being void, it was not in itself evidence of that location on the land and that purchase of it from the State and payment for it which would constitute them *bona fide* purchasers.

The constitute them such as against the patentee of the United States, to whose title they assert a better right, it would be necessary for them to allege in their pleading that in the contest for the land before the Land Department they not only produced their certificate of purchase, but they also proved, and there was "found," the performance of the series of acts required by law to entitle them to the certificate and the steps which had been taken to complete the purchase from the State, so as to entitle them to a patent from the State. (Laughlin *vs.* McGarvey, 50 Cal., 169; Cadierque *vs.* Duran, 49 *Id.*, 356; The Secretary *vs.* McGarrahan, *supra.*) Unless those things were proved and "found" they would fail to show in themselves that better right in favor of which a court of equity would interpose to control the right of the patentee; and one who claims simply, and by no other right than as assignee of their void certificate of purchase, is in no better position.

Moreover, it does not appear by any allegation in the complaint when the assignment of the certificate of purchase was made—whether before or after the contest before the Land Department—nor is it alleged that it was proved or found that the plaintiff was the owner and holder of the certificate, or a *bona fide* purchaser of the land in good faith and for a valuable consideration from the State.

He filed the complaint in this case in April, 1878, and all that he alleges on that subject is "that he is now the owner and holder of the certificate of purchase." Inferentially, therefore, he did not become the owner and holder of it until after the decision of the Land Department. If he purchased after that, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent; and as a purchaser of the certificate from the alleged original purchasers from the State, with notice of those things, he is not a *bona fide* purchaser from the State, within the meaning of the act of Congress.

But whether the purchase of the void certificate was made before or after the contest before the officers of the United States Land Department, as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it, to the United States or the State of California, it would be neither according to equity nor good conscience to compel the defendant to convey to him the legal title.

Furthermore, there is no allegation in the complaint that the land for which it is alleged that the land in dispute was selected has been lost to the State. Presumably, therefore, those lands were in place, and the land in dispute was not subject to selection, or if subject to selection, the right of selection had not accrued, because land within the exterior limits of a Mexican grant did not, under the act of July 23, 1866, become subject to selection until it had been excluded from the grant, and the lines of the survey by the United States had been extended over it, and the surveyor general of the United States for the State had furnished the State with an official list of the sections of land which were within a reservation, or private grant, or settled upon, and, in consequence thereof, were lost to the State. (Sec. 6, act July 23, 1866.) Such an official list was made necessary as the basis of selection of land in lieu of those lost sections, and until it was furnished the right to select had not accrued, and the land in dispute was not subject to selection. (Sherman *vs.* Bruick, 3 Otto, 209.)

It follows that the plaintiff has not, by his complaint, brought himself into such relations with the land in controversy as entitles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to control the patent which was issued to him.

Judgment affirmed.

McKEE, *J.*

We concur:
MYRICK, *J.*,
SHARPSTEIN, *J.*,
MORRISON, *C. J.*

I concur in the judgment:
McKINSTRY, *J.*

23 *Judgment of Supreme Court.*

In the Supreme Court of the State of California. In Bank.

JOSE AURREOCEHEA, Appellant,
vs.
DUNCAN SINCLAIR *et als.*, Respondents.
No. 7251.

On appeal from the superior court in & for the county of Alameda.

And now at this day this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by McKee, J.

We concur: Myrick, J.; Sharpstein, J.; Morrison, C. J. I concur in the judgment: McKinstry, J.

Whereupon it is adjudged and decreed by the court that the judgment of the district court of the 3rd judicial district, in and for the county of Alameda, in the above-entitled cause, be, and the same is hereby, affirmed, with costs.

Entered May 30th, 1882.

24 *"Bond for Costs."*

(Title of Court and Cause.)

Know all men by these presents, that we, the undersigned, Jose Aurrecoechea as principal, and Cayestano Castor Diez and M. Routet as sureties, are held and firmly bound unto Duncan Sinclair, Ed. R. Hamilton, Wm. P. Coleman, and the Sacramento Savings Bank in the sum of one thousand dollars lawful money of the United States, for the payment of which, well and truly to be made, we do hereby bind ourselves, our administrators and executors, jointly and severally, firmly by these presents.

Signed and sealed by us on this 30th day of June, 1882.

The condition of the above obligation is such that whereas the above bounden Jose Aurrecoechea has removed, or is about to remove, from the supreme court of the State of California to the Supreme Court of the United States, by writ of error, that certain cause in which he is the plaintiff in error and the said Duncan Sinclair and others are defendants in error:

Now, therefore, if the said plaintiff in error shall prosecute his said writ to effect, and if he fail to make his plea good, shall answer all damages and costs, then the above obligation shall be void; otherwise to be and remain in full force.

In witness whereof we have hereunto set our and each of our hands and seals, on the day and year first above written.

25 JOSÉ AURRECOECHEA. [SEAL.]
CAYETANO C. DIEZ. [SEAL.]
M. ROUTET. [SEAL.]

STATE OF CALIFORNIA, } ss:
City & County of San Francisco, }

Cayetano C. Diez and M. Routet, being duly sworn, make oath as follows: That they are the sureties who executed the foregoing undertaking; that they are each residents and freeholders within the State of California, and are each worth the sum specified in the said undertaking (in which sum they thereby bound themselves) over and above all their just debts and liabilities, exclusive of property exempt from execution.

CAYETANO C. DIEZ.
M. ROUTET.

Subscribed and sworn to on this 30th day of June, A. D. 1882, by each of the sureties who executed the foregoing undertaking, and whose names are subscribed to & mentioned in the above affidavit, before me.

[L. S.] CHAS. T. STANLEY,
Notary Public.

(Endorsed:) "Bond for costs." Approved July 7th, 1882. Stephen J. Field, Associate Justice of U. S. Sup. Court. Filed July 10, 1882. F. W. Gross, clerk, by C. Harlan, deputy clerk.

26 *Clerk's Certificate.*

In the Supreme Court of the State of California.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the papers and documents hereto annexed, entitled "complaint," "demurrer," "order sustaining demurrer," "judgment," "notice of appeal," "stipulation," "judgment of supreme court," "opinion and decision of supreme court of California," and "bond for costs," are true and correct copies of the original papers in said cause, and now on file in my office, and that the same constitute a complete transcript and record of all the proceedings in said cause, and to which I have annexed and hereby return a writ of error issued out of the Supreme Court of the United States, with assignment of errors on behalf of the plaintiff in error herein, with citation and proof of service.

Witness my hand and the seal of the court affixed, at my office, this 10th day of July, A. D. 1882.

[SEAL.] FRANK W. GROSS, *Clerk*,
By C. HARLAN, *Deputy Clerk*.

27 *Assignments of Error.*

1. The court erred in holding that the grantor of the plaintiff is not shown to have been a purchaser in good faith from the State of California under her laws, within the meaning of the act of Congress of July 23d, 1866, and that the plaintiff, as his successor in interest, was not and is not entitled to the same status as his grantor in that behalf.

2. The court erred in holding that, in proving up the plaintiff's claim and title under said act of Congress, it was incumbent on the claimant not only to produce his certificate of purchase from the State, but also to show the entire series of acts and proceedings, under the law of the State, which preceded the issuance of such certificate.

3. The court erred in holding that from and after the passage of the act of Congress of July 23rd, 1866, the certificate of purchase, claim, & title of plaintiff was still void, and that he did not acquire any equitable or other rights as a State purchaser under and by virtue of said act of Congress.

4. The court erred in holding that the grantor of the plaintiff did not by virtue of his purchase in 1864, and his possession taken and continued thereunder until 1870 (when he was ousted by the defendant Sinclair), become entitled by virtue of said act of Congress of July 23rd, 1866, to the exclusive right of possession as against said Sinclair until such time as he should have opportunity to present and prove up his claim under said act of Congress.

28 5. The court erred in assuming and holding that the defendant Sinclair had the right under the pre-emption laws of the United States to initiate his pre-emption settlement and claim in Sepember, 1870, by going upon the land in question while it was in the actual possession of the grantor of plaintiff and ousting him therefrom.

6. The court erred in holding that the presentation of the claim in 1866 to the register and officers of the United States land office, and the entry and noting of the claim by them in writing upon the tract-books of the local and General Land offices was not a substan-

tial compliance with section 2d of the act of Congress of July 23, 1866.

7. The court erred in not holding that the claim and title of the plaintiff properly belonged to the class of selection mentioned in section three of said act of Congress.

8. The court erred in holding that "there is no allegation in the complaint that the land for which it is alleged that the land in dispute was selected had been lost to the State."

9. The court erred in holding that the complaint does not show facts sufficient to have entitled the plaintiff to have had the land certified over to the State for his benefit under the act of Congress of July 23rd, 1866.

29 10. The court erred in ignoring and not deciding the real question presented by the complaint, viz: Whether the officers of the Land Department were legally justified in rejecting this claim for the sole reason that until the 6th day of June, 1871, the land had been embraced within the exterior boundaries of the Mexican grant.

11. The court erred in not reversing the judgment of the lower court and remanding said cause to the superior court of the county of Alameda, with direction to overrule the demurrer to the complaint.

Wherefore the plaintiff prays that the judgment of the supreme court of the State of California be reversed; that a mandate do issue to said court, directing it to reverse the judgment of the lower court and remand said cause to the superior court of the county of Alameda, with direction to that court to overrule the demurrer to the complaint in this action.

H. F. CRANE AND
EDWARD J. PRINGLE,
Attorneys for the Plaintiff in Error.

SIDNEY L. JOHNSON,
Of Counsel.

Endorsed on cover: California supreme court. No. 258. Jose Aurreocehea, plaintiff in error, *vs.* Duncan Sinclair, Ed. R. Hamilton, William P. Coleman, The Sacramento Savings Bank, John Doe, & Richard Roe. Filed August 21st, 1882.

114-387

In the Supreme Court of the United States

OCTOBER TERM, 1884.

JOSE AURRECORCHEA,
Plaintiff in Error,
vs.
DUNCAN SINCLAIR,
Defendant in Error.
No. 258.

JOSE AURRECORCHEA,
Plaintiff in Error,
vs.
JOSEPH D. BANGS, ADM'R,
Defendant in Error.
No. 703.

Brief of Plaintiff in Error in Reply to Mr. Mullany, Counsel for Sinclair.

EDW'D J. PRINGLE,
H. F. CRANE,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.
C. W. BROWN, PRINTER, 923 F ST., N. W.
1885.

See Stipulation at End of brief

In the Supreme Court of the United States

OCTOBER TERM, 1884.

JOSE AURRECORCHEA,
Plaintiff in Error,
vs.
DUNCAN SINCLAIR,
Defendant in Error.
No. 258.

REPLY TO BRIEF OF MR. MULLANY.

The case of Aurrecorchea *vs.* Bangs, administrator, No. 703, submitted to the court upon briefs about the 1st of last January, is, as to all matters of law and fact, the same as this case, and it is stipulated by counsel that the briefs filed in that case by the plaintiff in error may be used in this cause the same as though they had been filed herein. Such opening brief contains the assignment of errors relied on in both cases.

Counsel for plaintiff in error in both of said causes submits the following suggestions in reply to the brief filed by Mr. Mullany in this cause, he having been served with said opening brief:

(As there is nothing in the record showing the value of the land in question in this case, an affidavit has been made and filed herein, showing its value to be over five thousand dollars.)

The facts of the case consist of the averments contained in the complaint, which are admitted to be true by the demurrer; we therefore call the attention of the court to our former brief in the Bangs case, and to the complaint, for a concise statement of the facts of the case.

I.

Counsel says that this action is based solely upon the act of Congress of July 23, 1866.

We admit that this act of Congress is our main reliance, but aside from the cold letter of the law, we show that we bought this land of the State in 1864, and paid to the State the purchase price fixed by law, received from the State her title, and under such title entered into and held and enjoyed the possession and use of the land from 1865 to 1870, when Sinclair ousted us therefrom.

These are our equities, and the act of Congress comes in to enable us to ripen these equities into a perfect legal title.

The general Government, by this act, proposed to waive all irregularities concerning the selection and location of the land by the State, and to provide a means whereby the "*purchaser of the State title*" could perfect his title to the land.

The action is based upon the entire case, as stated in the complaint.

II.

Counsel proceeds to say that the plaintiff has stated himself into open enmity against equity and good conscience.

This seems to be based upon *his assumption* that we paid but 20 per cent. of the purchase price.

Counsel admits that *the law fixed the purchase price at* $1.25 *an acre;* the complaint avers that we "*then and there paid to said State the purchase price therefor, pursuant to the law of the State.*"

We submit that upon demurrer no objection can be raised, except it appears upon the face of the complaint—the law fixed the purchase price at $1.25, and the complaint avers that we paid it—but even if it appeard that we paid but 20 per cent. of the purchase price, and such mode of purchase was sanctioned by law, it is difficult to see how that affects our equities.

We submit that the averment of the complaint is equivalent to an averment that we paid the full purchase price of the land.

Counsel says it should not be overlooked that we procured our certificate of purchase in 1864, and this action was not commenced until April, 1878, (over fourteen years,) and after *defendant* had spent such a long portion of his life in improving and enhancing the value of the land. The record shows that we were in the exclusive possession and enjoyment of the use of the land from 1865 to Sept. 1870; on the latter date defendant first came upon the land and ousted the plaintiff.

So the court will see that it was the defendant who deprived us of our improvements and the labor of five years while we were in the undisputed occupation of the land.

Sometime after July 1, 1871, the proceedings between plaintiff and defendant commenced in the U. S. Land office, which terminated by the issuance of the patent to defendant on August 15, 1876. (See opinion of court; also p. 16 of Mr. Mullany's brief.)

The cause of action stated in the complaint accrued for the first time on the issuance of this patent in August, 1876.

The case of Huff *vs.* Doyle *et al*, 93 U. S. 558, was decided by this court Jan. 15, 1877, which gave a full and final construction of the act of Congress as to this class of lands.

This action was commenced in April, 1878—eighteen months after the cause of action accrued and fifteen months after said decision of this court.

III.

Counsel further says that the allegations of the complaint affirmatively show that plaintiff's grantor was not a purchaser in good faith from the State under her laws.

Stripped of all verbiage, this proposition of counsel is based entirely and solely upon the fact that the land in question was in 1863-'64 within the outboundaries of a Mexican grant—the main question.

We supposed that question had forever been laid at rest by the decision of this court in Huff *vs.* Doyle *et al.*; else this action would not have been commenced.

Upon this question we refer the court to said decision and to our views as stated in Sub. 3, page 15 of our opening brief in the Bangs case, No. 703.

Counsel is in the position upon this question of asserting and seeking to maintain before this court the proposition that solely because of this Mexican grant question his client, the defendant in error, had the right, under the law, on the 24th of September, 1870, to enter upon this land before the final survey of the Mexican grant and with a full knowledge of the claim of the grantor of the plaintiff in error, and while he was in actual possession of the land under such claim and forcibly oust him therefrom and settle where he had settled, and thus initiate his pre-emption settlement and claim and substitute himself as the rightful claimant in the place of our grantor.

We submit that such a proposition is abhorrent to every principle of law and justice.

The complaint shows that the plaintiff in error is now the holder and owner of the certificate of purchase, having succeeded to all the rights of the original state purchaser, his grantor and the criticisms of the court below and counsel upon this branch of the case are not justified by any averment in the complaint.

IV.

Counsel says that we did not pursue the proper method; or, as he says, the prescribed course to obtain the relief extended by the act of Congress of July 23, 1866.

No such question seems to have been raised before the Land Department, and our claim was treated as falling under the third section of the act. The land was marked off and designated in the field by the survey of the township in 1862. But such plat was withdrawn from the local land office, presumedly by proper authority, sometime in 1864 or 1865, and was not returned or made a permanent record therein until about July 1, 1871.

These townships are not regarded as surveyed lands of the United States until the survey is completed by the filing of the township plats as permanent records in the land office. No action can be taken relating to such lands while the plats are withdrawn or suspended.

The complaint shows that the land was selected and located by the state under her laws, and counsel admit that it was under the act of April 27, 1863 (Stat. Cal. 1863, p. 5917, Mr. Mullany's brief, p. 6). That law required a survey to be made by the county surveyor, and this was a part of the selection and location by the state.

We have shown, page 19 of our opening brief in Bangs' case, that the court below treated the land as unsurveyed land.

We submit that under the circumstances our claim appears to have been properly presented to the Land Department, under the act of Congress.

Nothing could have been done under either section 2 or 3 of the act until after July 1, 1871, and the mode of presentation ought not now to affect our rights in the premises.

V.

Counsel says that neither plaintiff nor his grantor had any right to receive their patent from the United States, and the issuance of the patent by the United States to defendant did not confer upon plaintiff any new right.

All this might be conceeded; we don't want his patent; in fact, never expect to get it. What we claim is this, that the defendant has been given *the legal title* to this land which of right and under a proper construction and application of the law belongs to us, and we submit that the courts ought to be as ready to correct wrongs as they are to assert rights when such rights are attempted to be invaded.

VI.

The case of Huff *vs.* Doyle *et al*, 93 U. S. 558, is sought to be refined away by counsel. The case speaks for itself. The defendants in error in that case entered upon the land in question in that case in the autumn of 1870, while Huff, the plaintiff in error, was in possession as the assignee of the State purchaser; they were attempting to pre-empt the land; a contest ensued in the Land Department, and on the same state of facts as shown in the complaint the land officers decided in favor of Huff and he obtained the title. In his action of ejectment under such title, Doyle and Bales, the pre-emptors, set up the fact that the land was embraced by the outboundaries of the same Mexican grant, and on that ground claimed that the title of Huff was void—in fact, that lands so situated were not embraced by the remedial provisions of the act of July 23, 1866, but were expressly excluded therefrom, and that the claim was wrongfully allowed and approved. On that issue the Supreme Court of California decided in favor of defendants and held the title to be void (50 Cal. Repts. 16). This court upon writ of error upon the same issue held that the state claim was rightfully approved under the act of Congress.

The case is a perfect demonstration of the proposition that the case at bar should have been approved, and that the plaintiff in error should have received the title to his land.

VII.

Counsel says that if the act July 23, 1866, had never been passed the decision of the case of Huff vs. Doyle et al. would have been just as it is, and could not have been otherwise.

We would call the attention of counsel to the fact that it *was otherwise* in the Supreme Court of California. But this proposition is so manifestly absurd that we do not deem it necessary to waste any words upon it.

The brief of counsel is like the opinion of the court below, stuffed with false assumptions and hypercriticisms on the complaint, which, upon examination, amount to nothing. Counsel has not attempted to answer our brief or sustain the decision of the State court, and neither the court or the counsel have met the case upon the merits as presented by the complaint, but have attempted to dispose of the case upon the merest technicalities and sophistries, and thus fritter away the substantial rights of the plaintiff, and thus consecrate a manifest wrong.

The court below take no notice of the fact that the defendant in error entered upon the land while in the actual occupation of the plaintiff's grantor, although this court had repeatedly decided that a pre-emption right could not be acquired in that way.

The court assume that the defendant in error and the plaintiff, and those under whom he claims, are upon an equality of right before the law, and they say that right of the defendant originated in the possession which he had of the land at the date of the filing of the official plat, "*his settlement gave him the status of a pre-emptor under the pre-emption laws.*" This, it will be seen, wholly ignores the character of his settlement, which, as we have shown, has been denounced as unlawful by this court. (See cases cited in opening brief.)

Again, the court first declare that this was a selection upon unsurveyed land, and that it was not surveyed by the United States until 1871, and later on in the opinion, for the purpose of throwing discredit upon our claim, they assume that it might have been surveyed land, and subject to the provisions of section 2 of the act of Congress.

In another part of the opinion the court say that "*as the plaintiff had never located on the land, never occupied or improved* *it, never paid or contracted to pay for it to the United States or the State of California,* it would not be equitable to compel defendant to convey to him the legal title.

We submit this assumption is not only false, but an exhibition of folly and ignorance.

The complaint shows that the grantor of the plaintiff paid the State for the land in 1864—the plaintiff, as his grantee, assignee, legatee, or successor in interest, has the same rights, and is subject to the same obligations, as such original purchaser.

Again, the court says in substance, that if the plaintiff did not succeed to the interest of the original purchaser until after the decision of the Land Department, he took with notice of the possession of the defendant of the *judgment* in his favor in the Land Department of the issuance of the patent, and therefore he is deprived of the status of his grantor as a bona-fide purchaser from the State.

This and many other similar assumptions and propositions, are not attempted to be supported by counsel, from their manifest absurdity.

We have shown in our opening brief that the law of the State expressly authorized the transfer of these certificates of purchase, and it follows that the successor in interest of the original purchaser took his title, with all his rights connected therewith.

Having replied to all that we deem material in the brief of Mr. Mullany, we submit the case to the consideration of this court, hoping that we may have a decision upon the very merits of the case.

We submit that the demurrer should be overruled in both cases and that we be permitted to have a trial in the court below upon the merits of the cases.

Respectfully submitted,

EDW'D J. PRINGLE,
H. F. CRANE,
Atty's for Plaintiff in Error.

In the Supreme Court of the United States.

JOSE AURRECORCHEA, *Plaintiff in Error,* *vs.* DUNCAN SINCLAIR, *et als,* *Defendant in Error.*	October Term, 1884. No. 258.

STIPULATION.

Whereas the case of Jose Aurrecorchea *vs.* Joseph L. Bangs, Adm'r, &c., No. 703, October Term, 1884, was submitted in this court on the 5th day of January last, for decision upon briefs and arguments on file; and whereas similar questions are involved in said case No. 703 to those involved in said case No. 258; and whereas it has been stipulated by counsel that the briefs and arguments on file in said case No. 703 may be used and considered by the court in said case No. 258, in the same manner and with the like effect as if they had been entitled and filed therein; and that the briefs and arguments on file in said case No. 258 may be used and considered in said case No. 703 as if entitled and filed therein. And whereas counsel for defendant in error in case No. 258 has filed his brief and argument herein, and counsel for plaintiff in error has filed a brief in reply thereto:

It is therefore hereby stipulated that the above case, No. 258, be and the same is hereby submitted for decision upon all of said briefs and arguments.

The object of this stipulation is that each of said cases, Nos. 258 and 703, shall have the benefit of all the briefs and arguments on file in both cases, and that said cases may be considered by the court at the same time.

Dated April 6, 1885.

EDW'D J. PRINGLE,
H. F. CRANE,
Counsel for Plaintiff in Error.

MICH. MULLANY,
Counsel for Defendant in Error.

Original on file

114-387

FILED.
MAR 28 1885
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 258.

JOSÉ AURRECOECHEA, *Plaintiff in Error,*

vs.

DUNCAN SINCLAIR, *Defendant in Error.*

IN EQUITY.

BRIEF OF DEFENDANT IN ERROR.

MICH. MULLANY.
Counsel for Defendant in Error.

THOMAS' Print, 505 Clay St., S F.

IN THE

Supreme Court of the United States.

JOSE AURRECOECHEA, *Plaintiff in Error,*

vs.

DUNCAN SINCLAIR, *Defendant in Error.*

PRELIMINARY STATEMENT.

This case is here on writ of error to the Supreme Court of California, to review the judgment of that Court, which is reported in 60 Cal. R., pages 532–551. Several other cases were, at the same time, disposed of on the authority of this case, and all or nearly all of which are now before this Court. In one of these cases now here, viz: *Aurrecoechea vs. Bangs*, administrator, etc., the plaintiff in error has prepared a brief and served a copy thereof, with notice that it would be the brief relied on in the above cause of *Arrecoechea vs. Sinclair*. Counsel for Sinclair proceeds accordingly.

DEFENDANT'S BRIEF.

This is a bill in equity seeking to have defendant declared trustee for plaintiff of the legal title to the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of S. 7, T. 3 S., R. 3 E., M. D. M., in Alameda Co., California, containing 80 acres. Stripped of surplusage, and in chronological order, the bill states in substance that:

Prior to 1860, the U. S. Government confirmed to one Livermore and another a Mexican Grant ("Las Pocitas,") of two square leagues within certain boundaries embracing a much larger quantity of land, *and embracing the* 80 *acres in controversy.*

In 1862, the U. S. Surveyor General for California surveyed the township embracing the land in controversy, made a township plat thereof, duplicated this plat and approved it, and caused it to be filed in the General Land Office at Washington, and in the office of said Surveyor General at San Francisco, Cal., and in the U. S. local land office in the district embracing said land, to wit: at San Francisco.

In 1863, the Locating Agent of the State of California selected and located the 80 acres in controversy, "in lieu of "and as indemnity for certain 16th and 36th sections of "lands in said State, or portions thereof, which had become "lost to said State;" *and this selection and location were defective and irregular.*

Between the selection of the land by the State Agent in 1863, and the 1st of July, 1871, the township plat of the township embracing the land in question was removed from the local land office by some person unknown to plaintiff, and was returned thereto on or about July 1st, 1871.

February 17, 1864, the Register of the State Land Office of California issued to plaintiff's grantors (not named) a certificate of purchase for the land in controversy, who paid to said State the purchase price therefor, pursuant to the laws of the State.

In 1865 plaintiff's grantor entered into the possession of the land under this certificate of purchase.

Some time in 1866 the claim of plaintiff's grantor to the land was noted by the Register of the local U. S. Land Office on the tract books of his office, and was also noted on the tract books of the General Land Office at Washington.

July 26, 1866, the Act of Congress entitled, "An Act to quiet land titles in California," was passed.

September 24, 1870, defendant (Sinclair) entered and made preëmption settlement upon the land in controversy, and ousted plaintiff's grantor therefrom, and claimed the right to preëmpt the same.

June 6, 1871, the Mexican grant, Las Pocitas, was finally surveyed, and the survey confirmed for two square leagues; and the land in controversy was not included in this final survey.

June 26, 1871, defendant (Sinclair) filed his declaratory statement in the local U. S. Land Office of his intention to preëmpt the land.

July 1, 1871, the abstracted township plat was returned to the U. S. local Land Office.

Between July 1 and October 1, 1871, plaintiff's grantor presented and urged his claim before the U. S. Land Department and its officers, and requested that the land be certified over to the State; and defendant (Sinclair) at the same time presented and urged his claims as a preëmption settler, and contested the right of plaintiff's grantor to the land; and a contest arose before the U. S. Land Department and its officers between plaintiff's grantor and defendant (Sinclair), and this contest was decided in favor of Sinclair; and thereafter, on

August 15, 1876, a U. S. patent was issued to Sinclair, as a preëmption settler, for this 80 acres.

Prior to April 10, 1878, (*i. e.* the commencement of this suit), plaintiff became the grantee of this lost cause.

April 10, 1878, plaintiff began this action to enforce a conveyance to him by Sinclair, without terms or reward, of the the title thus secured by Sinclair under his patent from the United States, "and that the plaintiff may have such further "or other relief as may be meet and proper and agreeably "to equity and good conscience," and costs.

To this bill of complaint Sinclair demurred on general and special grounds; *generally*, in that (*a*), the complaint does not state facts sufficient to constitute a cause of action, and shows no equity in plaintiff; and (*b*), the supposed cause of action is too stale, and is barred by the laws of California in that behalf, provided; *specially*, in that (*a*), it does not designate the 16th or 36th sections of land, or portions thereof, in lieu of which the land in controversy was selected by the State Locating Agent, or how the same became lost to the State; (*b*), or designate wherein the selection or location of the land in controversy by the State Agent was irregular; or (*c*), whether plaintiff's claim to the land had vested in him before or after July 1, 1871; and, (*d*) the pretended cause of action asserted by plaintiff is barred by the provisions of the laws of the State, in that behalf provided. This demurrer was sustained; plaintiff declined to amend, and judgment passed for defendant.

ARGUMENT.

As we understand it, the only ground on which this action comes before this Court, and on which plaintiff seeks to have defendant declared trustee for his use of the legal title to the land in controversy, is the Act of Congress of July 23, 1866, entitled, "An Act to quiet land titles in California," (14 U. S. Stat., p. 218).

This Act provides:

"Section 1. That in all cases where the State of Cal‑" fornia *has heretofore* made selections of any portion of the " *public domain* in part satisfaction of any grant made to said " State by any Act of Congress, and has disposed of the " same to *purchasers in good faith* under her laws, the lands " so selected shall be and hereby are confirmed to said " State."

From this general confirmation the proviso excludes six separate classes of lands, only two of which need be mentioned here, viz:

1st. "Land *held or claimed* under any valid Mexican or " Spanish grant;" and,

2d. "Land in excess of the quantity to which the State " was entitled by law for *school* or improvement purposes."

By sections 2 and 3, "the selections named in section one" are further provided for under two subdivisions, viz:

1st. Lands which had then been surveyed by authority of the United States; and,

2d. Lands which had not then been surveyed by the United States, but which had then "been surveyed by "authority of and under the laws of said State."

As to the lands then surveyed by the United States, it became the duty of the State authorities, where the same had not been done, to notify the register of the U. S. Land Office of the District, of such selection, "which notice shall "be regarded as the date of the State selection;" and it was the duty of the Commissioner of the General Land Office, *immediately* after the passage of the Act, to instruct the local registers to forward to the General Land Office, after *investigation and decision*, all such selections, and if found to be in accordance with Section one of the Act, the Commissioner should certify such selections over to the State.

As to the lands not then surveyed by the United States, but which had been surveyed by authority of, and under the laws of the State "and sold to purchasers in good faith "under the laws of the State, such selections shall, from "the date of the passage of this Act, when marked off and "designated in the field," have the effect of a settler's preëmption rights on unsurveyed public lands. Then follows provision for adjusting any difference that might be found between the then existing State survey and the United States survey, when the latter should be made; and for the presentation and proof by holders of State title after the filing of the township plat, "and if found in accordance with Section one of the Act," the land should be certified over to the State.

By Section 5, it became the duty of the Commissioner of the General Land Office to procure from the local offices and Surveyor General *immediately* after the passage of the Act, lists of all selections made by the State, referred to in Section one, for final disposition and determination, which was directed to be made without delay.

And Section 8 "provided that nothing in this Act shall be

" construed as in any manner to interfere with the right of " *bona fide* preemption claimants."

On April 27, 1863, the State passed a law for the disposal of her lands, including the 16th and 36th sections in each township, and when lost, of lands in lieu thereof. (Stat. of Cal. 1863, page 591). This law went into effect on June 26, 1863. (Stat. of Cal. 1860, page 16; and 1861, page 77.) The selection and location of the land in controversy, under the State laws, are alleged to have taken place in 1863; but whether before or after June 26, is not stated. So, it is uncertain whether the alleged selection and location were made under the Act of 1863, or under the laws of the State as they stood prior to 1863. But, as plaintiff seems desirous to have his complaint considered amended so as to state that the selection and location under which he claims were made under the law of 1863, let it be treated as if so amended. This law continued in force until after July 23, 1866; and the Act of Congress of that date seems to have been drafted in consideration of the State law.

I.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION; and, herein,

(*a.*) *Plaintiff states himself into open enmity against "equity " and good conscience."*

It is a familiar rule that "each party's pleading is to be " taken most strongly against himself, and most favorably " to his adversary. * * Any ambiguity, uncertainty or " omission in the pleadings must therefore be at the peril of " the party in whose allegations it occurs." (Gould's Pleadings, Chap. III., Sec. 169, etc). So, it is to be considered that the plaintiff at bar has stated his case in the best possible manner for himself, he having declined to amend.

His complaint in part is, that the certificate of purchase under which he claims was issued to his grantor in February, 1864, "pursuant to the law of the State," (Record, p .)

The price of such lands was, by that law, set at $1.25 per acre; and a certificate of purchase was obtained on payment of 20 per cent. of that price, *i. e.*, 25 cents per acre, (Stat. of Cal. 1863, p. 591, Secs. 2, 14, 17, etc). This is what plaintiff in his complaint calls the "purchase price," and what his learned counsel in their brief call the "*full* purchase price." But, as plaintiff's grantor acquired no greater evidence of payment than a certificate of purchase, and, "pursuant to the law of the State," that was acquired on payment of 25 cents per acre, it follows that the claim under which plaintiff seeks in "equity and good conscience" to deprive defendant of his purchased title to his homestead and exhausted preëmption right, by a second course of tedious and expensive litigation, *without terms or reward*, is the payment of a single $20 piece to some State official who had no authority to receive it. Nor should it be overlooked that this certificate of purchase was procured in February, 1864, and that this action was not commenced until April, 1878, (over fourteen years), and after defendant had spent such a long portion of his life in improving and enhancing the value of the land, and to such an extent that a half acre of it is worth more than double the entire "purchase price." The assertion of such a claim can be made only in gross disregard of equity and good conscience.

(b.) The allegations of the complaint affirmatively show that plaintiff's grantor was not a purchaser in good faith from the State under her laws.

A purchaser in good faith, *ex vi termini*, means one who has purchased for a fair price paid, something to which he has, by reason of his purchase and payment alone, acquired no title or a defective title by reason of some existing fact of which he had no notice or means of becoming informed by the exercise of reasonable diligence prior to payment for the thing so purchased.

So, the facts constituting absence of, or defect in, the title to the thing purchased and that it was purchased at a fair price, (stating it), and that the price was paid, makes only a *foolish* purchaser, or a purchaser in *bad faith*, as the case may be. The essential fact to make such a purchaser one in *good faith* is, that until he actually paid the purchase price he had no notice or means of becoming informed of the then existing want of, or defect in, the title to the thing so purchased.

Boone vs. *Childs*, 10 Peters R., 210-11.
Snelgrove vs. *Snelgrove*, 4 Desaus. Eq. 274.

Plaintiff alleges that the land in controversy was held and claimed as a part of a valid Mexican grant from a time prior to 1860 (and necessarily from a time prior to the acquisition of California by the United States), until June 6th, 1871. While so held and claimed the Mexican grantee was entitled to the exclusive possession thereof.

Ferris vs. *Coover*, 10 Cal. 621.
Mahoney vs. *Van Winkle*, 21 Id. 554.
Whitney vs. *McAffee*, Supreme Court, New Mexico, July 30, 1883, (1 W. C. R., 162).

And the State or her locating agent had no authority to select or locate it in lieu of other lands, whether such other lands were or were not lost to the State. And the certificate of purchase issued in February, 1864, to plaintiff's grantor for the land so held and claimed, was issued without authority of law and was void. In the words of this Court in *Newhall* vs. *Sanger*, (2 Otto, 764-5), "our legislation was " so shaped that no title could be *initiated* under the laws of " the United States to lands covered by a Spanish or Mex- " ican claim, until it was barred by lapse of time or re- " jected." In that case the Mexican claim was invalid; in the case at bar, it was valid. To the same effect is,

Van Renegan vs. *Bolton*, 95 U. S., 34, and the cases cited therein. (10 U. S. Stat. at Large, p. 246, Sec. 6, etc.)

Plaintiff does not state that his grantor was not aware of the *status* of the land, and that it was held and claimed as a part of the Mexican grant when the location thereof was made and when the certificate of purchase therefor was issued. He could not, however, have stated his case any better than he has done it, because the claim of the Mexican grant, and its extent, were of public notoriety, and well known to plaintiff's grantor. So, when the certificate of purchase was issued, plaintiff's grantor knew it was unauthorized and void. Plaintiff has, therefore, shown his grantor to have been only a purchaser in bad faith.

(c.) Plaintiff himself is not a purchaser in good faith from the State under her laws.

Plaintiff alleges the reservation of the land in controversy as a part of the Mexican grant, until June 6, 1871; that his grantor's selection and location of the land were irregular; that neither himself nor his grantor had been in possession or occupation of the land since September, 1870—indeed, that he himself has never been in possession at all; that his grantor inaugurated a previous contest and trial before the United States Land Department in 1871, and was defeated by defendant before that Department; and the many other facts (as contra-distinguished from conclusions of law) stated in his complaint. Fairly construed, the complaint means that plaintiff knew all of these facts to the extent of their existence at the time of the selection and location of the land by his grantor in 1863, and thereafter from the time they respectively transpired in the course of events. That "plaintiff is *now*, (April 10, 1878), the owner and holder of "said certificate of purchase of said land from the State "of California," adds something to the remaining allegations of the complaint in establishing that he is not a *purchaser* at all, or of anything, and that he became the *holder* of that form of certificate for the purpose of instituting a new suit and speculating upon its results, to the great injury and annoyance of defendant. He shows himself to be a speculative litigant (not even a purchaser) in bad faith.

The Act of Congress of July 23, 1866, confers no relief, either in spirit or expression, upon such holders of such certificates of purchase as plaintiff in this case asserts himself to be.

(d.) State selections of lands held and claimed under a Mexican grant on and after July 23, 1866, were not included within the curative provisions of the Act of Congress of that date.

The general provision of section one of this Act is confined to such selections as were *theretofore* made by the State of some portion of the *public domain*, and sold to purchasers in good faith under her laws, and as were then in a condition to be thereby confirmed to said State, at that time.

Lands held and claimed under a valid Mexican grant were not any portion of the public domain, and a sale of such lands was not authorized by the State laws, and were not in a condition to be then confirmed or listed to the State. But, *ex industria*, lands so held and claimed are expressly reserved from the general provision of section one, and thereby from the entire Act.

It will be seen from the entire face of the Act as well as from section one, that its provisions were designed to apply to such selections of portions of the *public domain*, as were in a condition to be thereby confirmed at that time. (Sections 2, 3, and particularly 5). And the exception under which the land in controversy comes is also expressive of the design. "Land *held or claimed* under any valid Mexican or "Spanish grant," is the expression of the exception. Held or claimed at what time? If it were not intended to mean *at the date of the Act*, the exception should read thus: "Land "which *shall be* included within the *final survey* of a Mexican "or Spanish grant."

In nearly all of the Mexican or Spanish grants in California, there was a great deal more land held and claimed under them, until final adjustment, than was included within the final surveys thereof. The Act of Congress was drafted in view of this fact. Some of these grants were finally surveyed and even patented when this Act was passed; and it was plain that, in a few years after its passage, all of them would be finally surveyed and patented. This exception from the general provisions of the Act did not therefore concern itself, (and it would be idle if it did) with lands which either then were, or should thereafter be, included within the final survey of a Mexican or Spanish grant. The exception concerned itself solely with lands which were *then held or claimed* under such a grant, whether the same should or should not be excluded from the final survey thereof.

(e.) Assuming that the land in controversy was not held and claimed under the Mexican grant on July 3, 1866, or at any time, and that the selection and location thereof stood in need of the curative provisions of the Act of Congress of that date, plaintiff fails to allege that he or his grantor pursued the prescribed course to obtain such relief.

It is alleged that in the year 1862 the township embracing this land was surveyed by the proper authority of the United States, and a township plat constructed from that survey, and that plat duplicated and approved, and the same was filed in the General Land Office, and in the office of the United States Surveyor-General for California, and in the local United States Land Office of the district, at San Francisco. There is, therefore, a full showing made that the land was surveyed by authority of the United States in 1862; and this is the only survey mentioned in the complaint.

Even if the duplicate of the township plat filed in one of these offices, *i. e.* in the local United States Land Office, was removed therefrom by some person unknown to *plaintiff* (but perhaps well known to his grantor), sometime after the selection and location of the land in 1863 and before July 1, 1871, and returned on the latter day, did not unsurvey the land. It is not stated that the plat was even suspended or withdrawn by any authority of the United States from the time it was filed up to this hour; and even a withdrawal or suspension of the plat would not *un*survey the land. The plat was always physically present in the office of the Surveyor-General and in the General Land Office; and it seems to have been also present in the local Land Office five days before July 1, 1871; because defendant's declaratory statement to pre-empt the land was received in the latter office on June 26, 1871. There was no other survey made; and this is the survey under which the land was disposed of and patented to defendant.

Section 2 of the Act provides the mode for securing its benefit for surveyed lands of the character mentioned in Section 1. Plaintiff makes no attempt to allege a compliance with these provisions. It is not alleged directly or indirectly that plaintiff or his grantor ever turned his mind towards, or in any manner dealt with, the State or her officers concerning this land since February 17, 1864; or that the State or her authorities were ever requested to, or that they or either of them ever did notify the register of the United States Land Office or any officer of the United States of this selection.

We need not dwell further on this point of the case, because plaintiff disclaims having attempted a compliance with the provisions of Sec. 2 of the Act; although he alleges the facts showing the land to have been surveyed by the U. S. in 1862. But, being that plaintiff *argues* against the allegations of his complaint, and as if the land was unsurveyed on July 23, 1866, let his complaint be examined under this argument.

It is not alleged that the land was unsurveyed at the date of the Act; and it is not alleged that the land was then or ever "surveyed by authority of and under the laws of the State" and which laws (Sec. 4, etc.) provided for a State survey of lands not surveyed by the U. S., before selection or location could be made thereof; nor is it alleged that there has been any designation or marking off of the selection in the field; nor is plaintiff's grantor shown to be a purchaser in good faith. And it affirmatively appears that the selection or location of plaintiff's grantor had no force or effect at the date of the Act, and could have none for almost five years thereafter; and that after *investigation* and *decision* by the officers of the U. S. Land Department, the claim of plaintiff's grantor to the land was disallowed.

There is no attempt to state facts showing that the land was not surveyed at the date of the Act of Congress, or that there was a compliance with the provisions of that Act, or with the laws of the State concerning unsurveyed lands.

Under the provisions of the State law (§ 20, etc) certificates of purchase were liable to be cancelled upon failure to pay interest on the remainder of the unpaid purchase price at stated times, and for other causes. Neither facts nor conclusions are alleged to show that the certificate of purchase under which the plaintiff claims, was in effect or uncancelled when he became the holder of it, or even when the plaintiff's grantor presented it upon the contest with defendant before the U. S. Land Department.

The Act of Congress in question provides that the State shall not receive a greater quantity of land for school purposes than she is entitled to by law. It is not alleged that if the State had received this land she would not have received a greater quantity than she is entitled to by law.

II.

Plaintiff alleges, also, that the selection and location of this land were *irregular* under the laws of the United States, "by reason of the defective legislation and action on the "part of the State in the selection and disposal of said lands." The demurrer is special to this allegation, and plaintiff declined to state wherein this irregularity consisted, or wherein the action on the part of the State was defective, or wherein the selection or disposal of the land was irregular under the State legislation. Nor is this irregularity, whatever it may have been, to be confounded with the reservation of the land as a part of the Mexican grant; because that reservation, of itself, constituted the selection and location thereof, and the certificate of purchase therefore *nullities i. e.* absence of material for any kind of *irregularity*.

That plaintiff repeatedly asserts, in *haec verba*, that his grantor and himself are purchasers in good faith from the State under her laws, is not an allegation of fact, and it amounts to nothing. Such assertions are but conclusions of the pleader, and they do not relieve plaintiff from a proper statement of the facts from which such conclusions are to be drawn by the Court.

Green vs. *Palmer*, 15 Cal. 412.

The demurrer is addressed to facts only, not to conclusions.

III.

It is not alleged that the land, in lieu of which the land in controversy was selected, was lost to the State; nor is the supposed lost land designated or described.

The absence of this allegation was pointed out specially, and plaintiff declined to state it. Presumably he could not have stated it without prejudice to his case, such as it is. For aught that appears, the 16th or 36th Section, in lieu of which the selection of this land was made, was not, to the knowledge of plaintiff and his grantor, lost to the State.

Neither plaintiff nor his grantor had any right to receive the title to the land from the United States; their right depended upon the right of the State to have the land listed to her. And plaintiff makes no attempt to state facts to show that the State had any right to receive the land, or that she ever applied for it, or that plaintiff or his grantor ever requested the State officials to apply for it; and he fails to allege facts establishing his own or his grantor's right to receive the title from the State, even if the land had been listed to the State.

IV.

In view of the allegations of the complaint, and in view of the absence of allegations therefrom, the decision of the United States Land Department in awarding the land to defendant is conclusive upon plaintiff and his grantor.

Congress had the power to confer, and did confer upon the Land Department, the exclusive jurisdiction to finally determine the validity of these State selections, and of the claims of pre-emption settlers.

Huff vs. *Doyle*, 93 U. S. 558.
Miller vs. *Little*, 47 Cal. 350.
Wilkinson vs. *Merrill*, 52 Cal. 424.

The instant the land in controversy became public land, *i. e.*, became freed from the claim of the Mexican grant, it was subject to defendant's pre-emption settlement. Within due time, on June 26, 1871, defendant filed his declaratory statement to pre-empt the land. Plaintiff's grantor did not appear to advance his claim until some time within three months after July 1, 1871. The very Act under which plaintiff's grantor claimed relief provides (Section 8), "That "nothing in this act shall be construed so as *in any manner* "to interfere with the right of *bona fide* pre-emption claim-"ants." The respective rights and claims of both parties then underwent investigation and decision, and the contest was resolved in favor of defendant; who accordingly paid the United States for the land and received his patent.

This decision was arrived at after investigation, touching not only the facts alleged in the complaint, but also, the numerous other facts which were essentially involved under the Acts of Congress and laws of the State, and which are partly mentioned in this argument. That decision, it is submitted, is conclusive of the rights of the contestants.

Wilkinson vs. *Merrill*, *(supra)*.

Indeed, it may be added, that in view of the fact that the land was surveyed by the United States in 1862, the plaintiff's grantor had no right to be heard at all by the Land Department, or any other tribunal.

V.

Plaintiff's pretended claim was barred by limitation of time, long prior to the commencement of this action.

The certificate of purchase which plaintiff holds, was issued by the State and under her laws, and its legal effect is prescribed by these laws. If good for any purpose, it "shall be deemed *prima facie* evidence of *legal title*."

Stat. of California, 1863, *p.* 597, *sec.* 17.
Hodapp vs. *Sharp*, 40 Cal., 73.

Defendant has been in the open, exclusive, adverse possession of the land from September, 1870, up to the present time. The land became freed from the claim of the Mexican grant on June 6, 1871. The title did not pass to defendant from the U. S. until August 15, 1876. Thus more than five years elapsed from the time plaintiff's grantor's cause of action accrued under the muniment of title which he held, before the defendant received his patent.

§ 318 *Code Civ. Pro. of Cal.*

Neither plaintiff nor his grantor had any right to receive this patent from the U. S.; and the issuance of the patent by the U. S. to defendant could not and did not confer upon plaintiff any new right which he did not have before, and did not revive for plaintiff any right which he had permitted to become forfeited or barred.

Toland vs. *Mandell*, 38 Cal. 30.
Poppe vs. *Athearn*, 42 Cal. 608

Plaintiff's sole reliance seems to be *Huff* vs. *Doyle*, 93 U. S. 558. But that case is in favor of defendant as far as it has any application to the case at bar. That was *an action at law* (ejectment) founded on a State patent. The land became a part of the public domain on June 6, 1871; and it was not surveyed by authority of the U. S. until June 28, 1871. On July 10, 1871, the State locator proved up his claim to the land, as such. His claim was contested by an alleged preëmption settler; and the contest was decided by the U. S. Land Department in favor of the State locator; and on November 15, 1871, the land was listed to the State by the U. S.; and on November 20, 1871, the State issued a patent to the plaintiff, the locator. The action was commenced on June 24, 1873.

When the land was listed to the State, it was public land and subject to be disposed of by the U. S. Land Department; and so the *legal title* passed to the State on November 15, 1871, and to the plaintiff, on November 29, 1871. Defendant did not seek to control that legal title, or set up any equitable defense thereto—in fact, he set up no other defense than that the plaintiff had no title at all. In that kind of action, the legal title necessarily prevailed.

If the Act of July 23, 1866, had never been passed, the decision of that case would have been just as it is, and could not have been otherwise.

The relative merits of the claims of the parties (State locator of *unsurveyed* lands and preëmptioner) to the contest before the Land Department were not before the Court, or in question at all. The defense raised only the single question of *authority* in the Land Department to list the land to the State when it did so. If the Land Department had, in that case, awarded the land, and issued a patent, to the defendant, preëmption settler, at the time it listed the land to the State; and if defendant had brought the action upon that patent, it is plain that, under the same defense, the judgment would be in his favor. For aught that appears, the Department may have *erred* in awarding the land to the State in that case, but it had authority to decide (and to *err*); and *authority* was the only question put in issue by the defense. The rectitude of the *decision* of the Department was not questioned at all.

The case at bar is *a suit in equity,* in which the State Court is asked to proceed with the same contest which was decided against plaintiff by the U. S. Land Department, concerning *surveyed* lands, and to have the decision of that Department reversed, and the title which defendant acquired from the U. S. as the result of that contest, turned over to him, plaintiff, without terms or compensation. The action is not founded on the decision of that Department, but rather seeks to have that decision reversed by a renewal of the contest upon which it was rendered.

It is the duty of the officers of the Land Department to try and decide contests of adverse claimants to the public lands which are subject to be disposed of by these officers under the laws. This rule underlies *Huff vs. Doyle,* and many other cases; and the defendant in the case at bar relies upon the same rule.

VI.

Observations Upon Plaintiff's Brief.

Plaintiff's brief proceeds upon facts very different to those stated in his complaint. Although he declined to amend his complaint in the trial Court, he seems inclined to avail himself of that privilege in this Court. His brief is a medley of *amendments to his complaint* and propositions of law addressed slightly to these amendments, but mainly against his general standing upon the case as stated in his complaint. The following portions of his brief may be noticed.

It is stated (pp. 2, 20) that the land in controversy was not surveyed by the U. S. until June or July, 1871; while it is alleged in the complaint that it was so surveyed in 1862, and no other survey is mentioned herein. And upon this *amendment* rests the burden of the argument throughout the brief.

It is assumed that sufficient facts are stated in the complaint to entitle plaintiff's grantor to the appellation of purchaser in good faith from the State under her laws; and this because plaintiff says he has not alleged in his complaint that his grantor "had any knowledge in 1864 that this land "was within the exterior boundaries of the Mexican grant" (p. 12); while there is no allegation that he did not have such knowledge even in 1863.

It is assumed that the demurrer is general only, while in fact it is both general and special.

It is asserted that the facts shown in this case are nearly identical, and the questions of law involved are the same, as in *Huff* vs. *Doyle, supra*; while the facts upon which the officers of the Land Department decided that case are not disclosed at all, and only an ineffectual attempt is made in this case to state the facts upon which the same officers decided it. As before the courts, that was an action at law and concerned unsurveyed lands; this is a suit in equity and concerns surveyed lands. The other distinctions have been already mentioned. It need hardly be added that the questions of law involved cannot be the same.

The changes in decisions of the officers of the Land Department, in view of the decisions of this Court, and of the Supreme Court of California are detailed at length; while the statement is all foreign to the record here. We do not consider we are called upon to examine the correctness of this statement.

It is said (page 7) that the Supreme Court of California has refused to meet the case on its merits, and upon false assumptions have denied any relief to plaintiff; while that Court has given plaintiff the benefit of facts very favorable to him (that the land was unsurveyed, for instance) and contrary to, or not contained in, his complaint, and, while the only relief which plaintiff asks, would be grossly inequitable and effect the ruin of others.

It is said (page 9): "It seems to be conceded that the "complaint upon the question of selection and location by "the State is good. No objection is made to that;" while no such concession is made; and while the objection is made by special and general demurrer.

While admitting that the certificate of purchase only entitles its holder to a State patent, *provided the land is confirmed to the State*, by the general government (page 11), the sole object of this action is to have the benefit of the general government's patent to another person turned over to the holder of the certificate of purchase after refusal by the general government to confirm the land to the State.

The excuse given for not alleging facts sufficient to show that plaintiff's grantor was a purchaser in good faith is, that plaintiff alleged that the officers of the U. S. Land Department found that plaintiff's grantor was a purchaser in good